79-42

Supreme Court, U. S.
FILED
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MICHAEL RODAK, JR., CLERK

IN THE

SUPREME COURT OF THE

UNITED STATES

ANNE M. PAVILONIS,

Petitioner

v.

JOSEPH CALIFANO, Jr., SEC.,

OF

HEALTH, EDUCATION and WELFARE,

Respondent

WRIT OF CERTIORARI TO

THE UNITED STATES COURT OF

APPEALS

FOR THE FIRST CIRCUIT

Anne M. Pavilonis

292 Park Street

Boston, Ma., 02132

June 30, 1979

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Petition for a Writ of Certiorari to the Supreme Court of the United States

The appellant petitions for a writ of certiorari to review the opinion, as modified, and the judgement of the Court of Appeals for the First Circuit entered in this case on April 24, 1979. Mandate entered April 30, 1979.

OPINION BELOW

The opinion of the Court of Appeals of April 24, 1979. (Appendix A) The order denying a rehearing. (Appendix B) The order of the District Court. (Appendix C) Mandate. (Appendix D)

JURISDICTION

The initial opinion of the United States Court of Appeals for the First Circuit was entered April 9, 1979. That court's order denying a rehearing and the accompanying modification of the initial

opinion was entered April 24, 1979. The jurisdiction of this court is invoked under 28 U.S.C. Section 1254 (1).

QUESTIONS PRESENTED

The question of race-conscious allocation of education funds is presented.

Does the respondent's omission to specify the language of the Emergency School Aid Act in regulation fail to prohibit state from establishing or maintaining schools as control groups or schools, for the purpose of program evaluation, deny equal protection of the law?

Did the respondent neglect to allocate emergency school aid funds equitably on a child in attendance basis by specifying a competitive point system giving greater benefit to Magnet schools having Title I, individualized instruction and services, to the exclusion of those Community District III schools neither Title I nor having individualized instruction

and services, deny equal protection?

Is the respondent's omission in his ESAA regulation an unconstitutional application of a law by a conspiracy with state to deny equal protection for the purpose of scientific experimentation?

When the respondent's regulations governing the allotment of ESAA funds conflict with the Supreme Court's decision, the Federal District Court's orders for a unitary school system, and have no support in ESAA are those regulations an intrusion on the separation of powers?

CONSTITUTIONAL PROVISIONS INVOLVED

The Emergency School Aid Act Section 710, specifies in pertinent part," ---- their effectiveness in achieving clearly stated program goals including impact on related programs and upon community served, and including where appropriate comparison with proper control groups composed of persons who have not participated in such

programs or projects."

Respondent's regulations, Evaluation, Section 185.13 (2) (d) specifies in pertinent part, "---- Such evaluations may require the establishment or maintenance of control groups or schools."

Emergency School Aid Act, Section 705 (b) (2) in pertinent part, "---application for assistance."

The respondent's regulations Funding Criteria (iii) specifies "--- compete."

Regulations Section 185.14, Education and programmatic criteria,"---individualized instruction and services." (21 points) Staffing, "---inservice teacher training." (3 points)

Emergency School Aid Act, Section 707 (a) (4) in pertinent part,"---Inservice teacher training designed to enhance the success of schools assisted under this title through contracts with institutions of higher education."

Emergency School Aid Act, Section 707 (b) in pertinent part,"---improving the educational achievement of children."

Fourteenth Amendment to the United States Constitution provides in pertinent part,"---nor shall any State deny to any person within its jurisdiction the equal protection of the laws."

Federal District Court Boston-Garrity,J., Memorandum of Decisions and Remedial Orders of May 10, 1975 state in pertinent part,"---a court has broad powers to fashion a remedy that will assure a unitary school system, Swann, supra, 402 U.S. at 16. And, schools in Community Districts are equal in educational offerings to Citywide schools, at 46.

28 USCA Section 2000d-1 (9) states in pertinent part,"---If federal funds provided by grant are administered in discriminatory manner, or if the support pro-

grams which is infected by discriminatory environment then termination of such funds is proper under this section."

STATEMENT OF THE CASE

The petitioners being evaluated for Massachusetts statue Ch. 766 and found in need of individualized instruction and services, were denied the services because of an admitted "verbal agreement" between the Boston School Committee and the State Board of Education to withhold such services in the Community District middle schools. Requesting private placement appropriate to their educational needs the petitioner were denied the placement.

Being geocoded to a Community District III middle school claiming to have Title I/ ESAA Reading programs of individualized instruction and services, the petitioners found those services were not funded.

Upon inquery the petitioners were informed that the Community District III schools were the control schools for the Ch. 636/ESAA experiment, wherein the variables of race and economic status are held constant with the similar variables in the Magnet schools, to test the effectiveness of individualized instruction and services ongoing in the Magnet schools, and funded in part by ESAA.

The Federal District Court at Boston-Garrity,J. refers to P.L. 93-380 and the corresponding Massachusetts statue Ch. 636 as supportive funding in his desegregation plan. The plan as stated in the Court's Memorandum of Decisions and Remedial Order of May 10, 1975, states in pertinent part, "---a court has broad powers to fashion a remedy that will assure a unitary school system, Swann, supra, 402 U.S. at 16. And, schools in Community Districts are equal in educational offerings to Citywide schools at p. 46. The petitioners contend

the Court's orders have not been implemented to date relevant to geocode, District-University pairing, instructional services and materials.

The non-compliance is traceable to the respondent's regulations governing the allocation of education funds provided by P.L. 92-318, as amended by P.L. 93-380. These regulations specify the establishing or maintenance of control schools. The Community District III schools are those control schools, having neither benefit of Judge Garrity's orders nor benefit of the federal education funds.

The regulations implementing the Massachusetts statue Ch. 636 are in concert with the respondent's in specifying the criteria and the competitive point system for the allocation of the supporting education funds.

The petitioners contend that a con

flict exists between implementing the federal court's orders and obtaining federal education funds that has created a crisis in the Boston schools. The petitioners and others in similar circumstances are children in crisis.

Recent evaluations of the petitioners indicate an intellectual regression of three and five grade levels respectively. Similarly, the percentile of Reading Achievement scores in the Community District III middle schools for the eighth grade level is thirty percentile. The federal department of Education maintains a sixty-one percentile in Reading Achievment score is appropriate for the eighth grade level.

The petitioners contend the federal, ESAA, funds provided by grant are administered in a discriminatory manner, based upon race; and the state's support program is infected with the same discriminatory environment.

Having exhausted all administrative procedures and finding no relief the petitioners entered a complaint in the United States District Court, pro se. Federal jurisdiction may be found at 5 USCA Ch. 7, Section 706 (22), 28 USCA Rule 8a, 54c and 42 USCA, Section 2000d-1 (9).

REASONS FOR GRANTING THE WRIT

The Court of Appeals has decided an important question of federal law which has not been, but should be, settled by this court. The basic issue raised by this case, the constitutionality of race-conscious allocation of education funds is of national importance as it impacts on every child in public education.

It is an historical fact that education is the cornerstone of this republic; if the republic is to grow, prosper and endure then the question of equal protection of education funds is indeed urgent.

Many contests in the courts have been waged since equal education opportunity was brought into fogus with Brown v. Board of Education; the question of equitable allocation of education funds, on a per school attending child basis, is now timely, as it brings guarantees to equal education opportunity.

The constitutional questions are reasonable and the relief is just.

CONCLUSION

The decision of the lower court represents a departure from the equal protection precedence of this court, and the country's commitment to a unitary school system.

The petition for writ of certiorari should be granted.

Wherefore, the petitioners pray this court will grant the writ of certiorari and the relief as requested in the court below, id est:

Enter a decree enjoining the respondent from disbursing Title VII, ESAA, monies to state.

Enter a decree requiring the respondent to prepare, adopt and implement specific regulations for eliminating discrimination in the allocation of all educational resources.

Enter a decree requiring the responent to allocate all education funds on a per school-attending child bases.

Compensate the petitioners for the deprivation of Civil Rights that caused great damage, the intellectual regression with resulting loss of self-esteem, anxiety and stress. For each of the petitioners two and one half million dollars compensation for damages is asked. And, reimbursement of all legal fees and expenses incurred.

By Its Attorney

Anne M. Pavilonis

UNITED STATES COURT OF APPEALS

FOR THE FIRST CIRCUIT

NO. 79-1076.

ANNE M. PAVILONIS

Plaintiff, Appellant.

v.

JOSEPH CALIFANO,Jr., SECREATRY

OF

HEALTH, EDUCATION AND WELFARE,

Defendant, Appellee.

ORDER OF COURT

Entered April 24, 1979

Treating appellant's motion to reverse and accompanying memorandum as a motion for rehearing, and upon due consideration thereof, said motion is denied. Neither the Emergency School Aid Act, 20 U.S.C. Sections 1601-1619, nor the Constitution requires appellee to issue the regulations appellant desires.

UNITED STATES COURT OF APPEALS

FOR THE FIRST CIRCUIT

NO.79-1076

ANNE M. PAVILONIS

Plaintiff, Appellant,

v.

JOSEPH CALIFANO, Jr., SECRETARY OF HEALTH, EDUCATION AND WELFARE,

Defendant, Appellee

COFFIN, Chief Judge

CAMPBELL and BOWNES, Circuit Judges.

MEMORANDUM AND ORDER

Entered April 9, 1979

Because is clearly appears that no substantial question is presented by this appeal, we sua sponte summarily affirm the judgement of the district court. First Circuit Rule 12. Appellant's pleadings and motions, comprised of vague and conclusory

allegations, fail to state a claim for relief under any of the civil rights statues which could even arguably be applicable to her claims. 42 U.S.C. Section 1983, 1985(3) 1986, 2000d-1. Hahn v. Sargent. 523 F.2d 461, 469-70, (1st Cir. 1975), cert. denied 425 US 904 (1976); Harrison v. Brooks, 519 F.2d 1358, 1359-60 (1st. Cir.1975); Soldevila v. Secretary of Agriculture, 512 F.2d 427, 429 (1st Cir. 1975).

The judgment of the district court is affirmed.

By the Court:

UNITED STATES DISTRICT COURT

DISTRICT OF MASSACHUSETTS

ANNE M. PAVILONIS
Plaintiff Civil Action

v. NO. 77-3304C

JOSEPH CALIFANO, JR., SEC.,
of HEALTH, EDUCATION and
WELFARE, Defendant

MEMORANDUM AND ORDER
December 28, 1978

Caffrey, Ch. J.

This matter came before the Court for hearing on defendant's motion to dismiss the complaint. At the hearing, plaintiff was allowed to file an amended complaint, after which the motion to dismiss was taken under advisement as to the amended complaint.

An examination of the amended complaint establishes that plaintiff herein is seeking to impose what amounts to vicarious liability on the Secretary of Health, Education and Welfare because of his alleged omission to specify equitable

use of certain educational funds. Plaintiff claims that this failure to specify allowed state officials to deny claimed rights to educational opportunities.

It is well settled law that 42 U.S.C.A. S. 1983 creates a cause of action against persons who, acting under color of state law, cause deprivation of civil rights, but it is equally well settled law that S. 1983 does not create a cause of action against a federal official acting pursuant to federal law. It is likewise well established law that S. 1983 does not make even a person acting under color of state law liable on a theory of vicarious liability. Accordingly, I rule that plaintiff's complaint has failed to state a claim against the Secretary upon which relief can be granted and that, accordingly, defendant's motion to dismiss should be and hereby is allowed.

CLERK'S OFFICE

U.S.COURT OF APPEALS FOR THE FIRST CIRCUIT

NO. 79-1076. Anne M. Pavilonis v. Joseph Califano, Jr., Secretary of H.E.W.

(Date) April 30, 1979

Mandate herein issued today.

Supreme Court, U. S.
FILED
AUG 29 1979
MICHAEL RODAK, JR., CLERK

No. 79-42

In the Supreme Court of the United States

OCTOBER TERM, 1978

ANNE M. PAVILONIS, PETITIONER

v.

PATRICIA R. HARRIS, SECRETARY OF HEALTH, EDUCATION, AND WELFARE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

MEMORANDUM FOR THE RESPONDENT IN OPPOSITION

WADE H. MCCREE, JR.
Solicitor General
Department of Justice
Washington, D.C. 20530

In the Supreme Court of the United States

OCTOBER TERM, 1978

No. 79-42

ANNE M. PAVILONIS, PETITIONER

v.

PATRICIA R. HARRIS, SECRETARY OF HEALTH, EDUCATION, AND WELFARE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

MEMORANDUM FOR THE RESPONDENT IN OPPOSITION

Under the Emergency School Aid Act (ESAA), 20 U.S.C. 1601-1619, the Secretary of Health, Education, and Welfare may award federal grants to local school authorities to help finance programs adopted as part of a desegregation plan; among the special programs eligible for ESAA grants is a program of individualized instruction.

Petitioner filed this action in the United States District Court for the District of Massachusetts, claiming that Boston school officials improperly denied individualized instruction to her two sons. She contended that this instruction was denied because the school to which her sons are assigned is a control group for purposes of comparison with a magnet school that has individualized

instruction. Petitioner contended that HEW's regulations, by allowing local school authorities to create control groups such as the one which allegedly has resulted in the denial of individualized instruction to her sons, are in violation of ESAA and the Fourteenth Amendment. Petitioner requested a change in the regulations and damages in the millions of dollars.

The district court granted the government's motion to dismiss on the ground that petitioner had not stated a cause of action under 42 U.S.C. 1983 (Pet. App. 16-17). The court of appeals summarily affirmed sua sponte, observing the "[a]ppellant's pleadings and motions, comprised of vague and conclusory allegations, fail to state a claim for relief under any of the civil rights statutes which could even arguably be applicable to her claims" (Pet. App. 14-15). Petitioner's "motion to reverse" was treated as a motion for rehearing; the court of appeals denied the motion on the ground that "[n]either the Emergency School Aid Act * * * nor the Constitution requires [respondent] to issue the regulations [petitioner] desires" (Pet. App. 13).

The decision of the court of appeals is correct and does not merit review by this Court. Petitioner's particular complaints about the actions of respondent have never been clear. Assuming that her complaint is that the Secretary must promulgate regulations forbidding the designation of schools as control groups for purposes of comparison to, and evaluation of, magnet schools, the court of appeals correctly held that the Secretary's failure to do so does not violate any of petitioner's statutory or constitutional rights.[1]

[1]Petitioner argued below that the regulations conflict with ESAA (see Pet. 2). But Section 710(a)(15) of ESAA, 20 U.S.C. 1609(a)(15), requires that grantees adopt "procedures * * * for the continuing evaluation of programs, * * * including, where appropriate, comparisons with proper control groups composed of persons who have not participated in such programs or projects * * *."

Petitioner focuses on "the constitutionality of race-conscious allocation of education funds" (Pet. 10)—a matter raised for the first time in the petition—but she has never indicated in this action how the use of control schools makes ESAA grants in Boston a "race-conscious" allocation of funds. Indeed, petitioner recognizes that Boston's magnet schools have the same racial and economic make-up as regular schools (Pet. 7). Moreover, Boston is subject to a desegregation order under which race-conscious remedies are allowable under *Swann* v. *Charlotte-Mecklenburg Board of Education*, 402 U.S. 1 (1971). See *Morgan* v. *Kerrigan*, 509 F. 2d 580 (1st Cir. 1974), cert. denied, 421 U.S. 963 (1975); *Morgan* v. *Kerrigan*, 530 F. 2d 401 (1st Cir.), cert. denied, 426 U.S. 935 (1976).

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

WADE H. MCCREE, JR.
Solicitor General

AUGUST 1979

DOJ-1979-08

Supreme Court, U. S.
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SEP 27 1979
MICHAEL RODAK, JR., CLERK

No. 79-42

IN THE

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ANNE M. PAVILONIS,

Petitioner

v.

PATRICIA R. HARRIS, Sec.,

OF

HEALTH, EDUCATION and WELFARE,

Respondent

ON PETITION FOR A WRIT OF CERTIORARI TO THE

UNITED STATES COURT OF APPEALS FOR THE

FIRST CIRCUIT

MEMORANDUM FOR THE PETITIONER IN REPLY

Anne M. Pavilonis

292 Park Street

Boston, Ma., 02132

OCTOBER TERM, 1978

MEMORANDUM FOR THE PETITIONER

IN REPLY

The respondent's regulations specify in its language the "establishment or maintenance of control groups or schools".(Sec. 185.13 (2) (d)); she repeats the language of control schools in her Memorandum for the Respondent in Opposition p.3. The language of "control schools" is not present in the Emergency School Aid Act, 20 USC 1609 (a) (15).

Control groups are defined by Doherty, M.E. and Shemberg, K.M. in Asking Questions About Behavior, Scott, Foresman & Co. 1970, page 79:

> "Control groups permit the researcher to make comparisons between the effects of the particular manipulation he is investigating --- and no manipulation at all."

> "A--- control procedure---is the general strategy of keeping all things constant across groups or subjects, everything except the specific manipulation that is under examination".

In this instance individualized instruction is the behavioral manipulation under examination.

The magnet schools in Boston are voluntarily racially balanced and have ESAA grants for a program of individualized instruction previously funded by Title I.

The ESAA awards are allocated according to the respondent's specified competitive point system that allows greater points to schools having individualized instruction.

The State, in compliance with the respondent's regulations, established District III schools as control schools,

assigning the petitioners on the bases of their race to those schools, creating a racial balance constant with the magnet schools. The State also deprived the District III schools of the individualized instruction provided by Massachusetts Law Ch. 766.

As a result of the deprivation of the individualized instruction, the District III control schools were denied equal protection of ESAA grants, because the control schools can not acquire equal points that determine the allocation of ESAA grants. The respondent's competitive point system reward those schools having individualized instruction in place at time of their application for the grant. Thus, the special programs of individualized instruction eligible for ESAA grants is denied the petitioners.

The respondent's regulations requiring control schools infringe upon the United States District Court of Massachusetts - Garrity, J. His Orders at page 46 state in pertinent part ---"schools in Community Districts are equal in educational offerings to Citywide schools." The United States District Court of Massachusetts - Garrity, J. did not order the Community District schools racially balanced.

The assignment of the petitioners on the bases of their race to control schools having an inferior learning environment violates the petitioner's equal protection of the Education Amendments of 1972, 20 USC 1652 enacted June 23, 1972, which states in pertinent part ---"No officer, agent, or employee of the Department of Health, Education and Welfare (including

the Officer of Education) or any other Federal Agency shall urge, persuade, induce, or require any local education agency to undertake transportation of any student--- where the educational opportunities available at the school to which it is proposed that such student be transported will be substantially inferior to those offered at the school to which such student would otherwise be assigned under a nondiscriminatory system---".

Wherefore the petitioner prays for the relief specified in her petition.

By Its Attorney, pro se

Ann M. Pavlonis